SUPREME COURT, U.S.
FILED
NOV 29 1993
OFFICE OF THE CLERK

No. 93-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SHRADER & YORK, SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C., SHRADER, CLOTE, HINDS AND GROTE, P.C., WILLIAM E. YORK, WILLIAM C. SHRADER, PAUL D. CLOTE, GARY E. GROTE AND ELDON HINDS

EUGENE B. WILSHIRE, JR.*
PATRICK J. DYER
WILSHIRE SCOTT & DYER, P.C.
4450 First City Tower
Houston, Texas 77002
(713) 651-1221

November 1993

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

The FDIC has phrased the question presented as one involving the imputation of knowledge of a "malfeasant insider" to the FDIC. If that is the question the FDIC seeks to present to this Court, the petition should be summarily denied; that issue is simply not presented by this case. The true question presented below was simply whether a state law claim for negligence was barred under state law principles of limitations before the FDIC acquired the claim. The Fifth Circuit held that the claim was, and its decision presents no novel theory nor any departure from established precedent. There was no issue of imputation of knowledge to the FDIC; instead, the case dealt with the imputation of a managing agent's knowledge to Texas corporations to determine if, under the Texas "discovery rule," the claims were time-barred before the FDIC acquired them.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	2
REASONS FOR DENYING THE PETITION	5
I. THE DECISION IS BASED ON ESTABLISHED PRECEDENT HONORED IN THE FIFTH AND NINTH CIRCUITS, AND THERE IS NO CONFLICT WITH *O'MELVENY*	7
II. PROCEDURAL AND EVIDENTIARY ISSUES RENDER THE PETITION UNWORTHY	11
III. THE QUESTION PRESENTED NOW WAS NOT FAIRLY PRESENTED IN THE COURTS BELOW	13
IV. THE PETITION SHOULD BE DENIED BECAUSE THE FDIC FAILED TO ALLEGE OR OFFER PROOF OF PROXIMATELY CAUSED DAMAGES	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Arthur Young and Co. v. Reves, 937 F.2d 1310 (8th Cir. 1991), *cert. granted*, 112 S.Ct. 1159 (1992), *cert. denied*, 112 S.Ct. 1165 (1992), and *aff'd* 113 S.Ct. 1163 (1993) 16
Bastian v. Petren Resources Corp., 892 F.2d 680 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990) 16
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11
D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) 9
FDIC v. Belli, 981 F.2d 838 (5th Cir. 1993) 10
FDIC v. Dawson, 4 F.3d 1303 (5th Cir. 1993) 7, 10
FDIC v. Former Officers and Directors of Metropolitan Bank, 884 F.2d 1304 (9th Cir. 1989), *cert. denied sub nom, Lee v. FDIC*, 496 U.S. 936 (1990) 7, 10
FDIC v. Hinkson, 848 F.2d 432 (3rd Cir. 1988) 10
FDIC v. McSweeney, 976 F.2d 532 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2440 (1993) 10
FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir. 1992), *petition for cert. filed*, 62 U.S.L.W. 3275 (U.S. Sept. 27, 1993) (No. 93-489) 5, 7, 8, 9, 10
FDIC v. Regier Carr & Monroe, 996 F.2d 222 (10th Cir. 1993) 10
Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) 7
Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983) 16
International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963) 12
LHLC Corp. v. Cluett, Peabody and Co., 842 F.2d 928 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988) 16
Lucas v. Texas Industries, Inc., 696 S.W.2d 372 (Tex. 1984) 15
Randolph v. RTC, 995 F.2d 611 (5th Cir. 1993) 10
Woods v. William M. Mercer, Inc., 769 S.W.2d 515 (Tex. 1988) 11

STATUTES

12 U.S.C. § 1823(e) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-651

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS SHRADER & YORK, SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C., SHRADER, CLOTE, HINDS AND GROTE, P.C., WILLIAM E. YORK, WILLIAM C. SHRADER, PAUL D. CLOTE, GARY E. GROTE AND ELDON HINDS

This brief is filed on behalf of the following respondents: Shrader & York; Shrader, York, Clote, Hinds and Grote, P.C.; Shrader, Clote, Hinds and Grote, P.C.; William E. York; William C. Shrader; Paul D. Clote; Gary E. Grote; and Eldon Hinds.

ABBREVIATIONS USED IN THE BRIEF

The following abbreviations are used throughout the brief:

FDIC	Federal Deposit Insurance Corporation
Pet.	The FDIC's petition for writ of certiorari
App.	Appendix attached to the FDIC's petition
App. II	Appendix attached to this brief
FIRREA	Financial Institution Reform, Recovery and Enforcement Act of 1989
Shrader & York	Refers to all respondents on whose behalf this brief is filed

STATEMENT

Lamar Savings Association and City Savings & Loan Association, two state-chartered thrifts, were declared insolvent on May 18, 1988 by the Federal Home Loan Bank Board. Pet. at 2. The FDIC commenced this suit against Shrader & York on May 17, 1991, one day short of three years later, and alleged that Shrader & York committed malpractice in connection with five separate commercial transactions which took place in 1983 and 1985. App. at 2a, 26a-27a. Suit was filed by the FDIC in its corporate capacity as the successor-in-interest of the assignee of the thrifts' claims. App. at 3a, 6a. Shrader & York moved for summary judgment on several grounds including the defense of limitations and the lack of cognizable legal damage. *Id.* at 2a.

In the district court, the FDIC initially asserted that FIRREA preempted the Texas law of limitations and revived the claims. App. at 28a. The FDIC also invoked the Texas discovery rule, and in addition, urged the court to adopt as Texas law the equitable tolling concept of

"adverse domination." App. at 7a-8a, 28a. The district court quickly disposed of the revival argument as being unsupported by any legal authority. App. at 28a. Regarding the discovery rule, the district court analyzed the evidence before it and determined that Stanley Adams, a principal in both thrifts and, according to the FDIC, the "driving force" behind the five transactions, knew or should have known sufficient facts to commence the running of limitations, and that his knowledge was properly imputed to the thrifts. *Id.* The trial court also ruled that the FDIC had failed to show that the concept of adverse domination had any bearing to the case. App. at 29a. Finally, the trial court ruled that the FDIC had failed to establish proximately caused damage. *Id.*

In the Fifth Circuit, the FDIC abandoned its revival argument and focused only on the Texas discovery rule and the concept of adverse domination. App. at 7a-8a. Analyzing the record before it, the Fifth Circuit concluded that the FDIC failed to establish that the discovery rule kept the statute of limitations from expiring before May of 1988. App. at 10a.

The FDIC's arguments to the contrary were simply not supported by the summary judgment record. Indeed, the Fifth Circuit's opinion repeatedly recites the inadequacy of the FDIC's proof on the imputation issue as a basis for the decision. For example, the FDIC argued that Adams' knowledge should not be imputed to the thrifts because he was acting adversely to them. App. at 15a. As the Fifth Circuit noted, however, regarding four of the five transactions, that argument entailed the FDIC's demonstrating that Adams acted entirely for his own purposes. App. at 15a-19a. It failed to do so: "[T]he FDIC did not offer summary judgment evidence that Adams embezzled, looted or otherwise personally profited at the expense of City or Lamar. . . ." App. at 19a. Regarding the fifth transaction, the court also found that, regardless of Adams' knowledge, the Lamar Board of Directors had

"a considerable amount of concrete information about the Brazos merger that should have put it on notice of potential legal malpractice claims. . . ." App. at 23a.

Each of the five transactions was examined by the Fifth Circuit, and the evidence was found lacking:

> An examination of the individual transactions reveals the inadequacy of the FDIC's summary judgment evidence on this issue. App. at 20a.
>
> The FDIC does not present evidence raising a fact question of whether Adams personally profited from City getting a bad deal on RDC. *Id.*
>
> [T]he FDIC has not produced summary judgment evidence that the transaction left City undercapitalized. *Id.*
>
> Again the FDIC fails to offer evidence that Adams personally profited from this [8214 Westchester] transaction at Lamar's expense. App. at 21a.
>
> The FDIC also fails to meet its burden with respect to Lamar's direct investments into CTC and Stone Oak. *Id.*
>
> [T]he summary judgment evidence indicates that any fraudulently inflated profits went on the books of Lamar and City, not into Adams' personal account. App. at 19a.

Similarly, the FDIC's alternative arguments were not supported by the summary judgment record. The FDIC argued that Shrader & York was not an innocent party and was therefore not entitled to the benefit of the imputation rule, but "[t]he FDIC has not alleged or produced summary judgment evidence that Shrader & York colluded with Adams, or that it did so to defraud City and Lamar." App. at 22a-23a. The FDIC argued that, because it was suing also on behalf of depositors and creditors, it was entitled to special treatment, but "the FDIC has not pled or offered summary judgment evidence that City and

Lamar's depositors and other creditors were clients of Shrader & York, and thus able to sue Shrader & York for professional malpractice." App. at 15a.[1]

Based on the record before it, the Fifth Circuit affirmed. App. at 10a. Recognizing that FIRREA did not revive the claims, the Fifth Circuit correctly analyzed and applied Texas law to determine that the claims were time-barred before they were acquired by the FDIC. App. at 7a-9a.

REASONS FOR DENYING THE PETITION

1. The petition should be denied because the Fifth Circuit's decision is founded, and can be upheld, on the basis of existing and unquestioned Supreme Court precedent. This Court held long ago that a claim barred under state law before acquisition by a governmental agency was not revived upon acquisition. Both the Fifth and Ninth Circuits have followed and applied that precedent, and there simply is no conflict on the pertinent issue—the viability of stale state law claims assigned to the FDIC. In this case, the Fifth Circuit followed precedent, examined Texas law, and determined that a Texas tort claim was time-barred prior to its acquisition by the FDIC. The decision involved no novel legal concept.

The Fifth Circuit's decision is not in conflict with any decision of the Ninth Circuit on the same issue. *FDIC v. O'Melveny & Meyers*, 969 F.2d 744 (9th Cir. 1992), *petition for cert. filed*, 62 U.S.L.W. 3275 (U.S. Sept. 27, 1993) (No. 93-489) (hereafter cited as *O'Melveny*), does not pertain to the FDIC's acquisition of stale claims. *O'Melveny* addresses the question of what substantive defenses may be available to defeat the merits of admittedly viable state claims assigned to the FDIC. The alternative holdings of *O'Melveny*, namely, that California law would

---

[1] Another difficulty with this argument was the inaccurate premise; the FDIC actually had not alleged any claims on behalf of depositors and creditors, and, in the trial court, had never urged that it was acting on their behalf.

not impute acts of wrongdoing insiders to a California corporation, and, alternatively, that the equitable defense of unclean hands could not be applied to the FDIC, are not, and cannot be, in conflict with the Fifth Circuit's interpretation of the Texas law of limitations. This case involves no imputation of knowledge to the FDIC; the imputation issue properly decided below dealt only with the application of the Texas "discovery rule" in the limitations context to determine if the claims were time-barred before the FDIC acquired them.

2. The petition should be denied because the Fifth Circuit's decision affirming summary judgment can be upheld purely on procedural and evidentiary grounds. As the Fifth Circuit repeatedly noted, the FDIC failed to carry its summary judgment burden. The arguments now advanced by the FDIC should not be considered by this Court because the FDIC failed to establish the underlying factual basis for its legal arguments.

3. The petition should be denied because it seeks to present to this Court an issue that was neither fairly raised nor in fact addressed in the courts below. The FDIC focused its arguments in the courts below on the application of Texas law. It never suggested that either the trial court or the Fifth Circuit should create federal common law and apply it retroactively to determine whether limitations expired on a state law claim while it was still owned by a state-created entity.

4. The petition should be denied because the decision can be affirmed on a basis, which, although not addressed by the Fifth Circuit, was correctly relied upon by the district court. Specifically, the FDIC failed to show that the alleged acts of malpractice proximately caused any recoverable damage; under clear Fifth Circuit precedent, causing a party to enter into a transaction, or as here failing to deter a party from entering into a transaction, that loses money does not make the procuring party

liable for the transactional loss. The trial court therefore correctly concluded that summary judgment was proper because the FDIC had failed to adduce any summary judgment evidence of damages.

I. THE DECISION IS BASED ON ESTABLISHED PRECEDENT HONORED IN THE FIFTH AND NINTH CIRCUITS, AND THERE IS NO CONFLICT WITH *O'MELVENY*

The stated basis for the petition is that the Fifth Circuit's decision conflicts with the Ninth Circuit's in *O'Melveny*. That is inaccurate, and the conflict is contrived. *O'Melveny* addresses the question of what substantive defenses are available to defeat a claim that was admittedly viable when assigned to the FDIC. This case, however, turns on whether any viable claim existed to be assigned to the FDIC.

In *Guaranty Trust Co. v. United States,* 304 U.S. 126 (1938), this Court held that a claim, time-barred under the state law that created it, is not revived by subsequent assignment to a federal agency: The federal agency "never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid." *Id.* at 142. It is now "settled law" that a federal court, when presented with the question of the viability of a claim assigned to the FDIC, must determine whether, under state law, limitations expired before transfer to the agency. *FDIC v. Former Officers and Directors of Metropolitan Bank,* 884 F.2d 1304, 1309 at n.4 (9th Cir. 1989) (citing and quoting *Guaranty Trust*), *cert. denied sub nom, Lee v. FDIC,* 496 U.S. 936 (1990); *FDIC v. Dawson,* 4 F.3d 1303 (5th Cir. 1993) (The "issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver.").

Contrary to what the FDIC's petition seems to suggest, this case presented no occasion for the Fifth Circuit to consider fashioning or interpreting federal common law. The pertinent issue was purely a question of state law. The rights asserted by the FDIC, as admitted assignee of Texas corporations, were created by Texas law, and the simple question was whether Texas law extinguished those rights prior to the assignment.

To decide the case, the Fifth Circuit analyzed and applied Texas limitations law, including its principles of claim accrual under the "discovery rule" and state concepts of "tolling." In its petition, the FDIC does not assail the circuit court's interpretation of Texas law. Instead, it argues that the knowledge of "wrongdoing insiders" had been "imputed" to the FDIC. That is not the case. The Fifth Circuit merely concluded that under Texas law, Texas corporations were on notice of what their managing agents knew or should have known. The court then determined when that knowledge was acquired, applied the Texas two-year statute of limitations to that date, and found that limitations expired while the claim was owned by the Texas institutions. Imputation, in the sense the FDIC uses the term in its petition, had no role to play in the analysis.

Nevertheless, seizing on the fact that the word "imputation" appears in the text of the opinion and, as well, in *O'Melveny*, the FDIC seeks to create conflict where none exists. The central question in this case was when and under what circumstances are Texas corporations charged with the knowledge held by managing agents. To the extent imputation was an issue, it was merely one of imputation to the institutions while they owned the claims.

O'Melveny, on the other hand, involved no question of limitations. The claim of conflict is predicated on the Ninth Circuit's alternative holding that, when the FDIC as receiver acquires a claim, the determination of what

substantive defenses can be interposed to defeat the merits of that claim is a question of federal law. *O'Melveny*, 969 F.2d at 751.[2] Without regard to whether that proposition is correct, it has no application to the issue presented here—whether a viable claim was ever acquired by the FDIC. That is a question controlled by state law.

The FDIC's misplaced invocation of the *D'Oench, Duhme*[3] doctrine not only fails to support a claim of conflict between the Fifth and Ninth Circuits, it undermines the FDIC's argument. Certainly *D'Oench, Duhme* can be invoked to defeat substantive defenses that would be available in a suit brought by an institution prior to its failure. *O'Melveny* involved such a substantive defense, and its reliance on *D'Oench, Duhme* was tenable. However, neither *D'Oench, Duhme*, nor its progeny, nor its statutory codification, 12 U.S.C. § 1823(e), can be extended beyond substantive defenses to displace state law on limitations and revive a debt that was barred before that institution's failure. No case has ever held, nor has any commentator suggested, that the *D'Oench, Duhme* doctrine revives time-barred claims. Thus, for example, when a federal court dismisses an FDIC suit based on a promissory note time-barred because a negligent or defalcating loan officer did not obtain a timely renewal, the misconduct of that loan officer is not being "imputed" to the FDIC. State law is merely being applied to a state law question. Likewise, in this case, no misconduct is being "imputed" to the FDIC.

---

[2] *O'Melveny*'s discussion of the FDIC as receiver is inapposite in any event because here the FDIC is not suing in the capacity of a receiver. As the Fifth Circuit noted, the FDIC was merely the successor-in-interest of the assignee of state law claims owned by the institutions. App. at 3a, 6a. While the FDIC asserts that this is irrelevant (Pet. at 5, n.2), it is another example of an attempt to create conflict where there is none.

[3] *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

Decisions of the Ninth Circuit involving limitations are in complete harmony with the decision in this case. Indeed, in a recent opinion the Ninth Circuit stated:

> It is settled law that state limitations statutes are relevant to determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired, that claim is not revived by transfer to a federal agency.

FDIC v. Former Officers and Directors of Metropolitan Bank, 884 F.2d at 1309 n.4; *accord, FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2440 (1993) ("The FDIC may not, however, revive claims for which the state limitations period has expired before the date of federal receivership.").[4] Therefore, if the issue in this case had been presented to the *O'Melveny* court, *Metropolitan Bank* and *McSweeney* would have dictated a result precisely the same as that reached by the Fifth Circuit. *See McSweeney*, 976 F.2d at 535 (Ninth Circuit panel must follow precedent established by prior panel).

The Fifth Circuit's decision is therefore correctly founded on precedent of this Court. There is no conflict between the circuits on any issue germane to this case, and the petition should therefore be denied.

---

[4] That this principle is "settled law" is surely correct. *See FDIC v. Hinkson*, 848 F.2d 432, 434 (3rd Cir. 1988) ("If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency."); *FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (10th Cir. 1993) (agreeing with *Hinkson*); *FDIC v. Dawson*, 4 F.2d 1303 (5th Cir. 1993) (FIRREA "has been interpreted not to revive stale state law claims acquired by the FDIC."); *FDIC v. Belli*, 981 F.2d 838, 842-43 (5th Cir. 1993); *Randolph v. RTC*, 995 F.2d 611, 619 (5th Cir. 1993) ("[W]e . . . have ruled that FIRREA does not revive stale claims.").

II. PROCEDURAL AND EVIDENTIARY ISSUES RENDER THE PETITION UNWORTHY

The FDIC's petition states that this case presents an issue of "fundamental importance" to the nation's regulators. Pet. at 4. Respondents disagree. Despite the hyperbole, this case was correctly resolved and affirmed on summary judgment procedure and proof. As this Court has stated, once a summary judgment movant has shown the absence of a material fact dispute, the burden shifts to the non-moving party to produce summary judgment evidence designating "specific facts establishing an issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Here, the Fifth Circuit carefully analyzed the record and determined that the FDIC had not carried its burden.

In the trial court and the Fifth Circuit, the FDIC relied on the Texas "discovery rule" to argue that limitations had not expired before the FDIC acquired the claims. Under that rule, the limitations period does not begin to run until the claimant discovers, or should have discovered through the exercise of reasonable care and diligence, the facts establishing the elements of the claim. The burden of proving that the discovery rule delayed accrual was on the FDIC. App. at 8a (citing *Woods v. William M. Mercer, Inc.,* 769 S.W.2d 515, 518 (Tex. 1988)). Under federal summary judgment procedure, therefore, the FDIC was required to adduce sufficient proof to establish the existence of material fact issues regarding the application of the discovery rule and the delayed accrual of the claims. App. at 9a.

The evidence submitted in the court below established that Stanley Adams, a principal in both thrifts, knew or should have known sufficient facts to commence the running of limitations, and that his knowledge was properly imputed to the thrifts. The FDIC itself had characterized Adams' conduct as deliberate and knowing, so it was obviously difficult to contend that he had no knowledge.

Nonetheless, the FDIC argued that Adams' knowledge should not be imputed to the thrifts because he was acting adversely to the thrifts. To succeed on that argument, however, the FDIC was required to demonstrate through summary judgment proof that Adams acted entirely for his own purposes. The FDIC failed to do so. As the Fifth Circuit noted, regarding four of the five transactions, the FDIC simply did not offer summary judgment evidence to support its factual arguments. App. at 19a. Regarding the fifth transaction, the court also found that the summary judgment evidence established that the board had sufficient information to commence the running of limitations. App. at 23a.

Notwithstanding the knowledge of Adams, the FDIC still failed to carry its burden. Under Texas law, when any disinterested officer or director has notice of a claim, limitations begins to run on a claim owned by a corporation. *International Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 580 (Tex. 1963). The FDIC failed to offer summary judgment evidence sufficient to raise a material issue of fact on this fundamental element of its claim. Indeed, there was no evidence offered regarding the actual or constructive knowledge of any officer other than Adams. The FDIC did submit affidavits of two directors stating that the two of them did not have actual knowledge of the claims. Those affidavits, however, did not suggest, much less establish, that other directors had no knowledge, and the FDIC introduced no evidence to satisfy its burden of disproving actual or constructive knowledge of the numerous other directors. Thus, regardless of the imputation of Adams' knowledge, the FDIC failed to satisfy its summary judgment burden that no disinterested officer or director had actual or constructive knowledge of the claim. The petition should therefore be denied because the FDIC failed to establish a factual predicate to support the presentation of its claim that only the knowledge of Adams had been imputed. The FDIC's unsuccessful invocation of the dis-

covery rule mandated summary judgment and required that the judgment be affirmed.

The Fifth Circuit correctly ruled that, based on the record before it, the FDIC had the burden of producing summary judgment evidence in support of its limitations arguments and that it did not carry that burden. The petition simply ignores the summary judgment record and requests this Court to do the same. The FDIC failed to carry its summary judgment burden of proof, its evidence was deficient, and the legal arguments it desires to advance at this point have no factual underpinning. For that reason alone, the petition should be denied.

III. THE QUESTION PRESENTED NOW WAS NOT FAIRLY PRESENTED IN THE COURTS BELOW

The petition states that the issue presented is whether the knowledge of a "malfeasant insider" should be imputed to the FDIC. To the extent this can be characterized as an issue in this case, it was not an issue that can be fairly said to have been raised in the courts below.

In the trial court, the FDIC made three arguments in opposition to Shrader & York's contention that all claims were barred by limitations prior to acquisition by the agency: (1) that FIRREA revived stale claims, (2) that the causes of action were not barred under Texas statutes of limitations on the date the FDIC acquired them and, (3) that the so-called "adverse domination doctrine" tolled the running of the Texas statute. Both its second and third responsive arguments were premised entirely on Texas law.

At no time in the trial court did the FDIC contend that application of the Texas discovery rule would result in "imputation" to it of the knowledge of "wrongdoing insiders." In fact, the FDIC's arguments were precisely to the contrary. The FDIC filed two briefs opposing summary judgment, and, in both, argued that, if stale

claims were not revived by FIRREA, then a "two step analysis" should be undertaken. Under this procedure, the trial court "must first determine whether the applicable Texas limitations periods had expired before the FDIC acquired the state law causes of action it alleges here. . . ." App. II at 8a. *See also* App. II at 6a: The "first issue is whether the applicable state limitations period had expired when the FDIC acquired the claim for malpractice." The FDIC therefore clearly recognized that the issue was purely one of state law.

On appeal to the Fifth Circuit, the FDIC abandoned its FIRREA revival argument, and stated that the issue on appeal was whether the trial court "erred in not tolling the statute of limitations under the discovery rule or the doctrine of adverse domination." App. II at 2a. Again, the focus was on the application of Texas state law, with one minor exception.

In a one-page segment of its fifty-page brief, the FDIC cited authority for the proposition that when a receiver owns claims of creditors, it may sometimes assert the creditors' claims. This, the FDIC argued, justified the disregard of knowledge imputable to the institutions. Of course, to the extent the receiver is bringing claims "in the right" of creditors, knowledge of the corporation is immaterial to the running of limitations on those claims. The problem with this theory, however, was that it was purely an abstract statement; here, the FDIC was not the receiver, and it had alleged no claims that were owned by shareholders or creditors.

The FDIC never articulated the argument, subsumed in its erroneous statement of the issue presented here, that federal common law can be created retroactively and applied retroactively to determine whether limitations expired on a state law claim while it was owned by a state-created corporate entity. That argument was not suggested, much less briefed, to the trial court, and it was not fairly presented to the circuit court. Indeed, the

FDIC's primary argument in the Fifth Circuit was that, under Texas law, the knowledge of the wrongdoing insider was not imputable to the failed institutions. The FDIC conceded that, if the claim were barred based on the imputation of knowledge to the thrift, it remained barred if brought by the FDIC. App. II at 6a, 8a. The issue of "imputing knowledge to the FDIC," as opposed to imputing knowledge to the institutions to determine if the claims were time-barred, was simply not fairly presented to the courts below. Because of that failure, the FDIC cannot claim that its petition deserves the attention of this Court.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE FDIC FAILED TO ALLEGE OR OFFER PROOF OF PROXIMATELY CAUSED DAMAGES

The petition should be denied for the additional reason that the Fifth Circuit's decision can be upheld solely on the basis that the FDIC failed to establish a prima facie case. Just as it failed with regard to the discovery rule, the FDIC introduced no evidence of damages proximately caused by the alleged negligence, and the trial court found the lack of such evidence to be an additional ground for summary judgment. While the Fifth Circuit did not address this ground, the record before it was sufficient to justify affirmance of the trial court. The FDIC's failure to establish the damage element obviates the need to consider the arguments in its petition.

An essential element of a negligence claim under Texas state law is that the plaintiff sustained damage proximately caused by the conduct. *Lucas v. Texas Industries, Inc.*, 696 S.W.2d 372, 376 (Tex. 1984). As the trial court held, the FDIC, in response to Shrader & York's motion, offered no evidence of losses proximately caused by the alleged malpractice. App. at 29a.

The FDIC chose to rely merely on its allegations, claiming that any loss on the loan transactions was recoverable.

At best, the FDIC alleged only "transaction causation," but that is plainly insufficient: "[C]ausing a party to enter a transaction that loses money does not make the procuring party liable for the transactional loss." *Huddleston v. Herman & MacLean,* 640 F.2d 534, 555 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 459 U.S. 375 (1983). "Loss causation" is required because it proves that the conduct "touches upon the reasons for the investment's decline in value." *LHLC Corp. v. Cluett, Peabody and Co.,* 842 F.2d 928 (7th Cir.), *cert. denied,* 488 U.S. 926 (1988).

As might be expected, the distinction between transaction and loss causation has often been noted in securities fraud cases, where the plaintiff must prove both. *Arthur Young and Co. v. Reves,* 937 F.2d 1310, 1328 (8th Cir. 1991), *cert. granted,* 112 S.Ct. 1159 (1992), *cert. denied,* 112 S.Ct. 1165 (1992), and *aff'd* 113 S.Ct. 1163 (1993). However, loss causation is not peculiar to securities fraud cases; it is a fundamental precept of the common law of torts:

> Indeed what securities lawyers call "loss causation" *is* the standard common law fraud rule . . ., merely borrowed for use in federal securities fraud cases. It is more fundamental still; it is an instance of the common law's universal requirement that the tort plaintiff prove causation.

Bastian v. Petren Resources Corp., 892 F.2d 680, 683-84 (7th Cir.) (citation omitted), *cert. denied,* 496 U.S. 906 (1990). In this case, the FDIC admittedly did not seek to allege or prove loss causation, an essential element of its claim. Summary judgment based on that failure alone was clearly proper, and the petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EUGENE B. WILSHIRE, JR.*
PATRICK J. DYER
WILSHIRE SCOTT & DYER, P.C.
4450 First City Tower
Houston, Texas 77002
(713) 651-1221

* Counsel of Record